

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CHAD M. FARRINGTON, an
individual,

Plaintiff,

v.

MENTOR CORPORATION, a
corporation,

Defendant.

NO. CV-06-0237-EFS

**ORDER DENYING DEFENDANT'S RULE
26(a)(2)(B) MOTION TO EXCLUDE,
GRANTING AND DENYING IN PART
DEFENDANT'S DAUBERT MOTION TO
EXCLUDE, AND GRANTING DEFENDANT'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

Before the Court, without oral argument, are Defendant Mentor Corporation's ("Mentor") Motion Pursuant to FRCP 37(c)(1) to Exclude Testimony of Plaintiff's Expert for Failing to File Expert Report in Compliance with FRCP 26(a)(2)(B) (Ct. Rec. 26), Motion Pursuant to Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharms.* to Exclude Testimony of Plaintiff's Expert (Ct. Rec. 29), and Motion Pursuant to FRCP 56(b) for Partial Summary Judgment (Ct. Rec. 32). After reviewing the submitted material and relevant authority, the Court is fully informed; the Court's reasoning and rulings follow.

A. Defendant's Motions to Exclude Expert Testimony

____ Defendant filed two motions directed at Plaintiff's witness Jeffrey Hirschauer, M.D. The first motion seeks to exclude Dr. Hirschauer's

1 expert opinions because Plaintiff failed to provide an expert report
2 that complied with Federal Rule of Civil Procedure 26(a)(2)(B); the
3 second motion seeks to exclude Dr. Hirschauer's causation opinions
4 because his opinions do not satisfy Federal Rule of Evidence 702 or
5 *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

6 Plaintiff responds that he is not calling Dr. Hirschauer as a
7 causation expert but rather as a treating physician; therefore,
8 Plaintiff correctly identified Dr. Hirschauer under Federal Rule of
9 Civil Procedure 26(a)(2)(A) as an individual who may be used at trial to
10 present evidence under Federal Rule of Evidence 702. Since Plaintiff
11 did not retain or specially employ Dr. Hirschauer as an expert, a Rule
12 26(a)(2)(B) expert report was not required. Accordingly, Defendant's
13 motion to exclude Dr. Hirschauer on Rule 26(a)(2)(B) grounds is denied.

14 Because Dr. Hirschauer will be testifying as a treating physician,
15 he is limited to providing medical opinions based upon his direct
16 treatment of Mr. Farrington. His testimony will be limited to matters
17 such as "'causation, future treatment, extent of disability and the
18 like" [that] are part of the ordinary care" of Mr. Farrington. *Elgas v.*
19 *Col. Belle Corp.*, 179 F.R.D. 296, 298 (D. Nev. 1998) (citing to *Piper v.*
20 *Harnischfeger Corp.*, 170 F.R.D. 173, 174-75 (D. Nev. 1997)). Prior to
21 Dr. Hirschauer providing medical opinions at trial, Plaintiff must lay
22 an adequate foundation to show that Dr. Hirschauer is qualified to
23 provide medical opinions and that his treatment of Mr. Farrington
24 included the following assessments: (1) that Mr. Farrington's condition
25 made him prone to autonomic dysreflexia, (2) that Mr. Farrington's
26 inability to catheterize his bladder would likely have caused an AD
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1 incident, and (3) that Mr. Farrington's reported discomfort is
2 consistent with his condition. Accordingly, Defendant's motion is
3 denied to the extent that Dr. Hirschauer may testify as a treating
4 physician after a sufficient foundation is laid.

5 Defendant's motion is granted to the extent that Dr. Hirschauer may
6 not opine that (a) the complained of episode of autonomic dysreflexia
7 involving the subject catheter ultimately caused a worsening of Mr.
8 Farrington's syrx condition, (b) Mr. Farrington's use of any
9 particular Mentor catheter caused him any permanent damage or injury,
10 and (c) Mr. Farrington's use of any particular Mentor catheter caused
11 the November 2005 surgery to become necessary.

12 **B. Defendant's Motion for Partial Summary Judgment**

13 Based on the parties' Joint Statement of Uncontroverted Facts (Ct.
14 Rec. 55) and Plaintiff's lack of opposition (Ct. Rec. 45), the Court
15 grants Defendant's partial summary judgment motion. The following fact
16 is deemed established for trial: The complained of episode of autonomic
17 dysreflexia involving the subject catheter did not cause permanent
18 injury or damage, did not cause a worsening of the syrx cyst
19 condition, and did not cause the need for surgery.

20 For the reasons given above, **IT IS ORDERED:**

21 1. Defendant's Motion Pursuant to FRCP 37(c)(1) to Exclude
22 Testimony of Plaintiff's Expert for Failing to File Expert Report in
23 Compliance with FRCP 26(a)(2)(B) **(Ct. Rec. 26)** is **DENIED**.

24 2. Defendant's Motion Pursuant to Fed. R. Evid. 702 and *Daubert v.*
25 *Merrell Dow Pharms.* to Exclude Testimony of Plaintiff's Expert **(Ct. Rec.**
26 **29)** is **GRANTED** (may not provide causation opinions) **and DENIED** (may
27

1 testify as treating physician after foundation laid) **IN PART.**

2 3. Defendant's Motion Pursuant to FRCP 56(b) for Partial Summary
3 Judgment (**Ct. Rec. 32**) is **GRANTED.** The following fact is deemed
4 established for purposes of trial: The complained of episode of
5 autonomic dysreflexia involving the subject catheter did not cause
6 permanent injury or damage, did not cause a worsening of the syrx cyst
7 condition, and did not cause the need for surgery.

8 **IT IS SO ORDERED.** The District Court Executive is directed to
9 enter this Order and furnish copies to counsel.

10 **DATED** this 25th day of February 2008.

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12 S/ Edward F. Shea
13 EDWARD F. SHEA
14 UNITED STATES DISTRICT JUDGE

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